

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

**TREE OF LIFE, INC. d/b/a
GOURMET FOODS MIDWEST¹**

Employer

and

JUAN BUSSO, An Individual

Case 30-RD-1415

Petitioner

and

**TEAMSTERS “GENERAL” LOCAL UNION
NO. 200, AFL-CIO²**

Union

DECISION AND DIRECTION OF ELECTION³

The sole issue is whether Juan Busso is a supervisor within the meaning of Section 2(11) of the Act. The Union argues that Busso exercises sufficient independent judgment in directing and assigning work, assigning overtime, granting time off to employees, disciplining employees, and evaluating employees to be a supervisor under the Act, and therefore, should be excluded from the unit. The Employer and Busso contend that Busso lacks sufficient authority to be a supervisor under the Act, and therefore, should be included in the unit. I find the Employer's and

¹The Employer's name appears as amended at the hearing.

²The Union's name appears as amended at the hearing.

³Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended (Act), a hearing was held before a hearing officer of the National Labor Relations Board (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Busso's position persuasive. I conclude that Busso is not a supervisor within the meaning of the Act and should be included in the unit.⁴

The following employees of the Employer constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.:⁵

All full time and regular part time warehouse, production and maintenance employees including but not limited to order selectors, auditors, drivers, forklift operators, inventory control employees, loaders, mail employees, maintenance mechanics, receivers, reclaim employees, repack employees, trainers, utility employees, X card employees and processing employees and warehouse office employees employed by the Employer at its Milwaukee, WI facility; but excluding all office clerical employees, salespersons, customer service employees, brokerage employees, purchasing employees, guards and supervisors as defined in the Act.

BACKGROUND

About 6 years ago, the Union was certified as the exclusive bargaining representative in this bargaining unit, when the Employer was Milwaukee Biscuit. A three year collective bargaining agreement was reached with Milwaukee Biscuit. In May 1999, the Employer purchased the business from Milwaukee Biscuit, and assumed the remainder of the collective bargaining agreement. A successor collective bargaining agreement was negotiated, and was in effect from August 9, 2001 through August 8, 2004.

The Employer is a gourmet specialty wholesaler and natural food distributor in Milwaukee, Wisconsin. Products are brought into the warehouse, where unit employees stock,

⁴The Employer and the Union filed post-hearing briefs that were carefully considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Union, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question concerning commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

⁵The parties stipulated that the above unit is appropriate for the purposes of bargaining and I find that to be the case. The parties also stipulated that the two leadmen, besides Busso, (who is also a leadman) appropriately are in the unit. Don Obst is the first shift leadman; Ron Mills is the third shift leadman.

pick, pack, and load the products for outbound delivery to customers. Currently, there are two shifts. The first shift operates from 7 a.m. to 3 p.m.; the second shift generally starts at 3 p.m., with employees reporting to work at staggered times, depending on their job classification. Employees on first shift accept the shipped product and replenish the warehouse; employees on second shift select the product and prepare it for shipment to customers. Mike Glunz is the first shift supervisor in the warehouse. On second shift, Larry Cotton is the supervisor and Joe Garcia is the production manager.

Busso has worked for the Employer for about 3 1/2 years. Initially, he was an order selector, a position he held for about 5 or 6 months. He then became an X card picker and also worked as a backup forklift driver, after which he became a leadman on the second shift, his current position. In February, 2004, Busso worked on the third shift, as a leadman, for approximately a month, until the third shift operations were merged with the second shift. Upon the elimination of the third shift, he returned to the second shift.

When Busso became a leadman he was paid 50 cents per hour more than the highest paid unit employee, a rate determined by the collective bargaining agreement. Unlike the acknowledged supervisors, who are salaried, Busso is paid hourly and receives raises pursuant to the collective bargaining agreement. His benefit package, as well as his terms and conditions of employment, are set forth in the collective bargaining agreement. Busso performs bargaining unit work, is skilled and knowledgeable in all areas of the warehouse operation, and assists employees as needed. He, as well as other employees, instructs new employees on their duties. All the leadmen use a desk in the transportation office, where supervisors and non-unit employees also work.

ANALYSIS

A. Legal Principles

Section 2(3) of the Act excludes from the definition of “employee” “any individual employed as a supervisor. . . .” The term “supervisor” is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the used of independent judgment.

The burden of proving that an individual is a statutory supervisor rests with the party asserting supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). The three-part test for determining supervisory status is whether: (1) the individual has the authority to engage in any one of the twelve functions listed in Section 2(11) of the Act; (2) the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) the authority is held in the interest of the Employer. *Id.*

The Board has cautioned that the supervisory exemption should not be construed too broadly because the result of such a construction would be to remove individuals from the protection of the Act. *Training School of Vineland*, 332 NLRB 1412 (2000). The burden of proof, therefore, is a heavy one. See *Franklin Hospital Medical Center d/b/a Franklin Home Health Agency*, 337 NLRB 826, 829 (2002). The Board reviews the facts in each case in order to differentiate between “the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestions, and between the appearance of supervisor and supervision in fact.” *Providence Alaska Medical Center*, 320

NLRB 717, 725 (1996). The exercise of some supervisory authority in a merely routine, clerical or perfunctory manner does not confer supervisory status on an employee. *Id.*

The indicia enumerated in Section 2(11) are to be read in the disjunctive; hence if an individual possesses a single indicium listed in that Section, that individual is a supervisor.

Unifirst Corp., 335 NLRB 706, 713 (2001). In this regard, the evidentiary touchstone is that the individual must possess the authority of any one of the indicia in Section 2(11) and not the exercise of that authority. *Allstate Insurance Co.*, 332 NLRB 759, 760 (2000).

Finally, in relatively close cases, the Board looks to well-established secondary indicia, including the individual's job title or designation as a supervisor, attendance at supervisory meetings, job responsibilities, authority to grant time off, and whether the individual possesses a status separate and apart from that of rank-and-file employees. *See NLRB v. Chicago Metallic Corp.*, 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan Assn.*, 237 NLRB 844 (1978); and *Flex-Van Service Center*, 228 NLRB 956 (1977).

B. Supervisory determination

In its brief, the Union argues that the leadman position is not a supervisory position, but the Employer “ . . . has given Juan Busso authority beyond that which other lead persons hold and thereby made him a supervisor within the meaning of the Act.” The four bases from which the Union argues for Busso's exclusion are discussed below. The Employer's brief asserts that “ . . . Busso did not have any indicia of supervisory status,” and that he should be included in the unit.

For the reasons set forth below, I find that Busso is not a supervisor within the meaning of the Act, and is appropriately included within the unit.

1. Independent Judgment to Assign and Direct Employees

Production Manager Joe Garcia assigned Busso from his leadman position on second shift to the third shift because third shift supervisor Ted Hudson left his employment in February 2004. The switch from second to third shift was a temporary assignment, lasting approximately a month, to allow for the elimination of the third shift and its merger with the second shift. For several hours each day, in the middle of the third shift, there was no supervisor on duty. Busso testified that while assigned to the third shift, he only carried out orders given to him by Production Manager Joe Garcia or Supervisor Larry Cotton, and his authority was limited to their directives.

The Union contends that in mid-February, Busso once assigned work to Union steward Johnnie Moorner. According to Moorner, there was not much work to do when he reported for work one day, and Busso directed him to work on an order that had been on the dock for some time. (Busso denied that this incident occurred.) According to Moorner, there was no supervisor present when Busso directed him to work on the delayed order.

The Union's argument that Busso was a supervisor because he once assigned work to Moorner cannot establish supervisory status under the Act. Significantly, the Union's entire argument on this subject is based on the approximately one month, earlier this year, that Busso worked the third shift. The Union's brief cites no evidence, which would establish such authority after Busso returned to his second shift leadman position, which he presently holds.⁶ So, even if Busso had supervisory authority (a proposition not established by the record evidence) for a

⁶The Union asked Busso whether his duties changed when he returned to the second shift leadman position, and he replied that they did not. This generalized statement must give way to the specific details of Busso's job duties, elicited by the parties during the time Busso worked on third shift, and when he returned to work as the second shift leadman. The facts establish that Busso's second shift leadman duties do not include the independent authority to assign work to unit employees, and

month's time, the fact that he no longer exercises this power demonstrates he is not currently a supervisor. Moreover, a single assignment of work to a single employee would not establish supervisory status, particularly under the unique circumstances where Busso worked on the third shift when it was being eliminated:

While, under some circumstances, a recurring practice of elevating a unit employee to a supervisory post when the supervisor is absent has been held to vest the employee with indicia of supervisory authority which persists when he or she returns to the bargaining unit, a single instance of exercising supervisory authority during an absence for a reason not likely to occur again is normally not sufficient to warrant the conclusion that the employee in question is a supervisor. *Olka-Inn d/b/a Holiday Inn of Henryetta*, 198 NLRB 410 (1972).⁷

2. Allowing Employees to Leave Early and Taking Calls Under the Attendance Policy

According to the Union, Moorer's testimony established that on three occasions, when his shift overlapped with Busso's, Busso told employees they could leave when their work was finished. Busso testified that on more than one occasion he, indeed, let employees leave before the normal end of the third shift, but he also testified that Garcia or Cotton directed him to do this. The Union asserts that Busso exercised independent judgment by determining when the work was done, and whether employees had to work overtime.

Again, the Union asserts record evidence of supervisory status exclusively during the time when Busso was on the third shift. The Union points to no evidence that Busso allowed

that he, at most, only exercises routine authority.

⁷*Fry Foods, Inc.*, 241 NLRB 76, 88 (1979). See also, *St. Francis Medical Center-West*, 323 NLRB 1046, 1046-1047 (1997).

employees to leave early after he returned to his second shift leadman position. In fact, the Union's own argument demonstrates that Busso did not exercise any authority to dismiss employees early when he served as second shift leadman:

Moorer also testified that he has never been give (sic) permission to leave early by a lead person; rather, such a direction must come through his immediate supervisor.

According to the Union, “. . .during the time Busso worked on third shift. . .he took calls from employees who indicated that they were running late and needed to use some flex time.” This, the Union argues, demonstrates that “Busso was clearly the third shift supervisor during the months of February and March 2004 after Hudson's departure and had the authority to take calls from employees under the attendance policy.”

Busso testified that when he returned to his second shift leadman position, his role in taking attendance phone calls was limited to translating for employees who did not speak English. As the Union does not argue Busso had authority to take phone calls under the attendance policy after he returned to his second shift leadman position, I do not find he had supervisory authority in this regard.

3. Holding Out Busso as a Supervisor

In late April of this year, the Employer distributed a company phone listing, prepared by a secretary at the Employer's Minneapolis facility, showing that Busso was the third shift supervisor. The Union cites this as an instance where the Employer held Busso out as a supervisor. The Employer's director of operations testified the phone directory listing of Busso as a supervisor was an error, and that as soon as she became aware of it, she e-mailed various employees, including Busso, to alert them of the error. A corrected directory promptly followed.

The Union does not argue that Busso has been listed as a supervisor since he returned to his second shift leadman position. The circumstances of the April 2004 phone listing do not establish Busso's supervisory status, as it was obviously an error, an error promptly corrected.

As another example of holding out Busso as a supervisor, the Union cites an instance, on the third shift, where an employee refused to perform work that Busso wanted her to perform. After the employee's refusal, Busso sent an e-mail to, and spoke with, Garcia, who in turn talked to the employee. The Union speculates that Garcia must have told the employee to obey Busso's orders, and that "...Garcia was effectively holding Busso out as a supervisor to her and instructing her that she needed to heed his direction." Because third shift employees who worked with Busso now work with him on the second shift, the Union asserts, employees still perceive him as a supervisor. In sum, the Union contends:

The Company clearly held Busso out as a supervisor while he was working third shift and based upon his testimony that nothing has changed in his day-to-day activities since his return to third shift, that same perception is still being conveyed to employees.

The Union points to no evidence that Busso, after his return to second shift leadman, has any independent authority to discipline employees or direct their work. As noted previously, the conclusion that Busso's duties are identical, as supervisor on the third shift and as leadman on the second shift, is defeated by the specific evidence of his duties in his current position.

Accordingly, I find that the Employer did not hold out Busso out as a supervisor.

4. Busso's Earnings

Busso is paid a base rate of \$17.08, and receives an additional 25 cents per hour shift premium for working on second shift. Before becoming a leadman, Busso earned between \$10.50 and \$10.80 per hour as a forklift operator. Third shift leadman Ron Miles earns \$14.78

per hour; first shift leadman Obst earns about \$17.00 per hour. According to the Union, Busso is paid in excess of what is called for under the collective bargaining agreement, and because he is paid more than the other leadmen, he must be considered a supervisor. Article VII, Section 2 reads:

Leadman pay shall be paid no less than \$0.50 per hour more than the regular hourly rate of pay those employees would be receiving if they were not assuming the Leadman duties.

The Employer's director of operations testified that Busso, according to the Employer's interpretation of the collective bargaining agreement, was paid 50 cents above the highest paid unit employee, an employee who has since left. Likewise, Miles was paid 50 cents about the highest paid unit employee when he became a leadperson. According to the director of operations, when Miles became a leadman, the highest paid employee earned less than the one used to establish Busso's wage rate, accounting for the leadmen wage rate differences between Busso and Miles. The Union introduced no evidence to contradict the Employer's testimony. In any case, Busso's rate of pay is comparable to leadman Obst, and the collective bargaining agreement sets a floor of \$0.50 above what the employee would be making. Nothing prohibits the Employer from paying more.

The critical, uncontradicted evidence establishes that Busso's pay, and terms and conditions of employment (as well as that of the other two leadmen) are determined by the collective bargaining agreement. Acknowledged supervisors are paid a salary, are eligible for incentive pay, but are not covered by the collective bargaining agreement. Supervisors have different evaluation forms, and are evaluated under different standards from employees covered by the collective bargaining agreement. Busso's earnings, thus, do not make him a supervisor.

CONCLUSION

Based on the foregoing, and the entire record, I conclude that Juan Busso is not a supervisor within the meaning of Section 2(11) of the Act, and must be included in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election day, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by **Teamsters "General" Local Union No. 200, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, **two**, copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, Suite 700, Henry S. Reuss Federal Plaza, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on or before September 15, 2004.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, Franklin Court, 1099 14th Street, N.W. Washington, DC 20570. **The Board in Washington must receive this request by September 22, 2004.**

Signed at Milwaukee, Wisconsin on the 8th day of September 2004.

/s/Irving E. Gottschalk
Irving E. Gottschalk, Acting Regional Director
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